Supreme Court, U.S.
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No. 02-367

IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITIONER'S THIRD SUPPLEMENTAL BRIEF: RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

PETITIONER'S THIRD SUPPLEMENTAL BRIEF..... 1

DISCUSSION 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Page

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 3

Construction Laborers v. Curry, 371 U.S. 542 (1963) 3

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ..... *passim*

Etcheverry v. Tri-Ag Service, Inc., 993 P.2d 366 (Cal. 2000) 9

Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964) 7

Mathews v. Eldridge, 424 U.S. 319 (1976) 7

Pierce County v. Guillen, 123 S. Ct. 720 (2003) 7

Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440 (Tex. 1993) 5

STATUTES

7 U.S.C. § 136v(b) ..... *passim*

28 U.S.C. § 1257 ..... *passim*

PETITIONER'S THIRD SUPPLEMENTAL BRIEF[1]

Pursuant to Sup. Ct. R. 15.8, Petitioner American Cyanamid Company hereby submits this Third Supplemental Brief, which responds to the Brief for the United States As Amicus Curiae ("U.S. Br."), filed May 30, 2003.

DISCUSSION

The Government's brief, which the Court invited by order of November 12, 2002, acknowledges that the petition in this case "raises potentially important questions respecting the preemptive effect of Section 136v(b) of FIFRA." U.S. Br. at 8. Further, the Government nowhere disputes that the significant federal pre-emption question conclusively addressed in the opinion below – whether agricultural crop injury claims are excluded from the widely accepted principle that FIFRA pre-empts labeling-related damages claims – continues to divide the Texas Supreme Court and California Supreme Court, and also the Texas Supreme Court and U.S. Court of Appeals for the Fifth Circuit. After almost seven months of consideration, however, the Government has filed a brief which takes "no position at this time" on the merits of this frequently recurring "exception to pre-emption" question, whose prompt resolution is vital to farmers, the pesticide industry, and the agricultural economy. *Id.* at 19. Instead, the brief asserts that the opinion below "is not 'final' for purposes of 28 U.S.C. 1257," and as a result, that this case does not provide the Court with "an appropriate opportunity" for review. *Id.* at 8.

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[1] The amended Rule 29.6 corporate disclosure statement filed with Petitioner's Supplemental Brief remains accurate.

We respectfully disagree. The Texas Supreme Court rendered a final decision holding "that state common-law claims about target area crop damage are not preempted" by FIFRA. Pet., App. at 2a. As previously discussed, this final state court decision on the federal pre-emption issue falls squarely within the fourth category of "cases in which the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). This is because (i) "the federal issue has been finally decided in the state courts;" (ii) "reversal of the state court on the federal issue would be preclusive of any further litigation *on the relevant cause of action*;" and (iii) "refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-83 (emphasis added). *See* Pet. at 1-3; Petitioner's Reply Br. at 1-4; Br. of CropLife America as *Amicus Curiae* in Support of Petitioner at 2-8.

This Court has recognized that "the power of [a] state court to proceed in the face of [a] preemption claim" is "an issue separable from the merits and ripe for review . . . particularly 'when postponing review would seriously erode the national . . . policy' " at issue. *Cox*, 420 U.S. at 483 (referring to and quoting *Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963)). As a result, the Court on numerous occasions has granted immediate review of "interlocutory" state court pre-emption decisions. *See* Br. of CropLife America at 4-7 (collecting cases). The Government's brief fails to acknowledge these cases.

Unless the Court reviews at this time the important FIFRA pre-emption question decided by the Texas Supreme Court and raised by the petition in this case, Petitioner, and other pesticide manufacturers, formulators, or distributors which sell their products in Texas, the nation's second largest

agricultural state, will be compelled to "face further proceedings in the state courts which the state courts have no power to conduct." *Construction Laborers*, 371 U.S. at 550. That would continue to seriously erode the congressional policy underlying § 136v(b) of FIFRA, which is "to ensure a uniform nationwide approach to pesticide labeling." U.S. Br. at 5.

1. The Government's brief does not deny that "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. *See* Petitioner's Reply Br. at 4-6; Br. of CropLife America at 4. According to the Government, however, the Court lacks jurisdiction because "petitioner cannot show that 'reversal of the state court on the federal issue would be preclusive of any further litigation on the *relevant cause of action*.' " U.S. Br. at 11 (quoting *Cox*, 420 U.S. at 482-83) (emphasis added). This is plainly incorrect. The "relevant cause[s] of action" for purposes of the federal issue (i.e., the FIFRA pre-emption question) decided by the Texas Supreme Court are Respondents' labeling-related causes of action, no matter how denominated (e.g., strict liability, breach of implied or express warranties, violation of the Texas Deceptive Trade Practices Act). The labeling-related causes of action are the "relevant cause[s] of action" because, as the Government's brief agrees, "FIFRA preempts state-law damages actions that impose labeling and packaging requirements in addition to, or different from, those that FIFRA imposes." U.S. Br. at 16 (capitalization of argument heading omitted). By its very nature, the federal pre-emption doctrine precludes a plaintiff from pursuing state law causes of action that conflict with federal law. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-24 (1992). Therefore, if this Court grants the petition for certiorari and then reverses the Texas Supreme Court's pre-emption holding, that *necessarily* "would be preclusive of any further litigation on the relevant cause[s] of

action" (i.e., on the labeling-related causes of action). *Cox*, 420 U.S. at 482-83.

According to the Government's brief, reversal of the federal pre-emption opinion below would not be preclusive because "[t]he [Texas] supreme court, unlike the lower Texas courts, did not address the question whether or not [Respondents'] claims were 'label-related.' " U.S. Br. at 8. To the contrary, that is *exactly* what the state supreme court did, albeit implicitly:

First, as the Government's brief explains, the state court of appeals explicitly affirmed at the outset of its opinion that the "off-label" advertising statements on which all of Respondents' causes of action are based "merely repeated information on the [herbicide labels]," and as a result, affirmed that "[a]ll of [Respondents'] state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." Pet., App. at 16a & 16a n.2; *see* U.S. Br. at 7. Yet, the court of appeals held that because those labeling-related claims involve agricultural crop damage, they are not pre-empted. By affirming this court of appeals judgment, the Texas Supreme Court implicitly agreed that Respondents' causes of action are labeling-related.

Second, the Government's brief overlooks a crucial point underlying the Texas Supreme Court's pre-emption analysis: In reaching its conclusion that FIFRA does not pre-empt Respondents' claims, the court indicated that "it is not the *breadth of preemption*, but rather the breadth of the congressionally created *exception to express preemption* that determines the outcome." Pet., App. at 1a (emphasis added). The state supreme court did not have to "struggle to determine the breadth of federal preemption" under FIFRA because, as the court explained, it previously had held, consistent with the overwhelming majority of federal and state cases, that FIFRA pre-empts "claims relating directly or

indirectly to labeling." *Id.* at 13a, 14a (quoting *Quest Chem. Corp.* v. *Elam,* 898 S.W.2d 819, 820 (1995)). Instead, the court undertook to "determine the breadth . . . of an exception to *that preemption*" (i.e., to FIFRA pre-emption of *labeling-related* claims). *Id.* at 14a (emphasis added). In light of this approach, the court's holding that there is an "exception to express preemption" for crop damage claims necessarily recognizes that Respondents' causes of action are labeling-related. Otherwise, the state supreme court would have been rendering an advisory opinion, which it cannot do. *See Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("Texas courts, like federal courts, have no jurisdiction to render such [advisory] opinions.").

Indeed, it is reasonable to infer from the opinion below that the Texas Supreme Court implicitly affirmed, consistent with the explicit opinions of the lower Texas courts, that *all* of Respondents' claims (i.e., causes of action) are labeling-related. For example, rather than attempting to distinguish its holding in *Quest Chem. Corp.* v. *Elam,* that FIFRA pre-empts "claims relating directly or indirectly to labeling," on the ground that some or all of Respondents' claims are not labeling-related, the court explained that "[t]he fundamental difference is that *Quest* involved a claim for personal injury while this case involves a claim for target crop damage." Pet., App. at 13a.

The Government's brief argues that the Texas Supreme Court has not addressed whether Respondents' claims are "label-related" because it supposedly "has not resolved whether respondents' causes of action in this case actually entail the imposition of 'any requirements for labeling or packaging in addition to or different from those required under [FIFRA],' within the meaning of Section 136v(b)." U.S. Br. at 8, 9; *see id.* at 15. In other words, according to the Government, unless a claim is found to be pre-empted by § 136v(b), it cannot be found to be labeling-

related. The Government fails to reconcile this contention, however, with the opinion of the state court of appeals, which the Texas Supreme Court affirmed. As indicated above, the Government's brief acknowledges the court of appeals "stated at the outset that '[a]ll of [respondents'] state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing.' " U.S. Br. at 7 (quoting Pet, App. at 16a). The court of appeals then "held that 'plaintiffs' state law claims *relating directly or indirectly to labeling* are not preempted by FIFRA because such claims involve the efficacy of the products and not the risks to humans and the environment posed by the use of the product." *Id.* at 7-8 (quoting Pet., App. at 24a) (emphasis added). Thus, contrary to the Government's contention that the lower court could not have determined that Respondents' claims are labeling-related without finding them to be pre-empted, the court of appeals did just that by holding that even though Respondents' claims *all relate directly or indirectly to the labeling involved in this case,* they are not pre-empted.

The Texas Supreme Court adopted this approach when it held that claims involving crop damage are excluded from FIFRA pre-emption of labeling-related claims. Thus, the Texas Supreme Court already has implicitly affirmed that all of Respondents' causes of action are labeling-related. As a result, if this Court grants review and reverses the lower court's holding that causes of action involving crop damage are excluded from FIFRA pre-emption, there will be nothing remaining for the lower court to do except mandate dismissal of this case.

2. Even if the state supreme court had construed only some of Respondents' claims as labeling-related, that would be enough to confer jurisdiction under § 1257. Nothing in *Cox*'s fourth category requires that reversal of the state court's ruling on the federal issue must terminate the entire litigation. Instead, as the Government's brief repeatedly

indicates, the final decision on the federal issue must only be "preclusive of any further litigation on the *relevant* cause[s] of action" (i.e., on the labeling-related claims). *Cox*, 420 U.S. at 482-83 (emphasis added). *Cf. Pierce County v. Guillen*, 123 S. Ct. 720, 728-29 (2003).

Along the same lines, the Government's jurisdictional arguments fail to take into account Respondents' concession in their Brief in Opposition that at least some of their claims are labeling-related. *See* Respondents' Brief in Opposition at 1-2. Because reversal of the Texas Supreme Court's opinion would be preclusive of any further litigation at least as to those admittedly labeling-related claims, that is enough to invoke the Court's jurisdiction under § 1257. *See* Petitioner's Reply Br. at 4 n.4.

The Government's brief asserts, however, that "[i]f the Court were to conclude that at least one (but not all) of respondents' causes of action would be preempted if it reversed the decision of the Texas Supreme Court . . . the question would then arise whether 28 U.S.C. 1257 should be construed (in the manner of Fed. R. Civ. P. 54(b)) to permit a judgment that is not final as to the entire case to be regarded as final with respect to the disposition of particular claims." U.S. Br. at 16 n.3. *Cox* (which restated the holdings of earlier cases on § 1257 jurisdiction) already answers this question in the affirmative by limiting the "finality" analysis to whether "the *federal* issue has been finally decided" and whether "reversal of the state court on the *federal* issue would be preclusive of any further litigation on the *relevant* cause[s] of action." *Cox*, 420 U.S. at 482-83 (emphasis added); *see, e.g., Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964) ("The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein on the cross-petition does not render the judgment of the Ohio Supreme Court on the issue

here considered and decided nonfinal or unappealable within the meaning of 28 U.S.C. § 1257.").

3. Rather than adhering to this Court's "intensely 'practical' approach" to finality issues under § 1257, the Government's brief advocates one that is immensely impractical. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). Under the Government's constricted view of finality in this case, this Court would have no jurisdiction to resolve the deep split of authority on the important federal pre-emption question presented unless and until Petitioner were to (i) endure a trial before a Texas state court jury on failure-to-warn product liability claims which the lower courts already have determined are labeling-related, and which Cyanamid contends are pre-empted; (ii) suffer an adverse judgment; and then (iii) relitigate the FIFRA pre-emption issue in the Texas appellate courts and obtain a Texas Supreme Court opinion which *explicitly* affirms that Respondents' claims are labeling-related but again holds that because they involve crop damage, they are not pre-empted. *See* Br. of CropLife America at 7-8. This *costly, time-consuming, repetitious, and very uncertain procedure* that the Government's brief maintains is required for obtaining a "final" state court federal pre-emption ruling which qualifies for § 1257 jurisdiction could not have been what the Court intended when it explained in *Cox* that "the requirement of finality is to be given a 'practical rather than a technical construction.' " *Cox*, 420 U.S. at 478 n.7 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

4. The Government's brief notes the pending certiorari petition in *Eyl v. Ciba-Geigy Corp.*, No. 02-1500 (filed April 10, 2003). U.S. Br. at 19 n.5. As discussed in Petitioner's Second Supplemental Brief, the petition in *Eyl* requests the Court to review, despite the near unanimity among the lower courts, the basic, well established principle that § 136v(b) of FIFRA expressly pre-empts failure-to-warn

and other labeling-related damages claims. There is no reason for the Court to grant the *Eyl* petition. Indeed, the Government's brief here provides the Court with even more reason to deny the *Eyl* petition by advising the Court that the "United States has reexamined" the categorical position against FIFRA tort pre-emption that it advocated as *amicus curiae* in *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000), and that it "has concluded" that its *Etcheverry amicus* position (a position upon which the *Eyl* petition heavily relies) is "*incorrect*" and "*no longer represents the view of the United States*." U.S. Br. at 9 (emphasis added); *see also id.* at 17. Moreover, the Government's brief does not dispute that if the Court were to grant review in *Eyl* and uphold the lower court's affirmation of FIFRA pre-emption in that personal injury case, the crop damage "exception to pre-emption" question presented here would remain completely unresolved. *See Petitioner's Second Supplemental Brief.* This is all the more reason why the Court should deny review in *Eyl* and grant review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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